

A Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–605 OF 1998
ABDUL KADIR SULAIMAN, ARIFIN ZAKARIA AND TENGKU
BAHARUDIN SHAH JJCA
31 OCTOBER 2006

C *Bankruptcy — Capacity of bankrupt — Sale of land by undischarged bankrupt — Whether land at the material time qualifies as property that is capable of being divisible among creditors — Official assignee had not taken step to intervene or to register his interest in the subject land — Whether Bankruptcy Act 1967 s 24(4) applied*

D *Land Law — Indefeasibility of title and interests — Sabah Land Ordinance (Cap 68) — At the date of execution, vendors did not have any registered right or interest in the subject land — Whether agreement void rendered or invalid — Sabah Land Ordinance (Cap 68) Ch V & s 88*

E The subject matter of the dispute in this case is a piece of land ('the subject land'). On 1 February 1989, the second and third defendants ('second and third appellants') entered into a sale and purchase agreement with the second plaintiff ('second respondent') in respect of the subject land. The main thrust of the appeal is

F that the sale and purchase agreement dated 1 February 1989 ('the 1989 agreement') between the second and third appellants on the one part and the respondents on the other part was invalid and void on three main grounds. Firstly, it is the contention of the appellants that on the date of execution of the 1989 agreement and the impugned power of attorney the subject land was yet to be registered in the name of second and third appellants. Based on s 88 of Sabah Land Ordinance

G ('the Ordinance') the appellants claim that at the material time the second and third appellants did not have any right or interest over the subject land which is capable of being disposed by to first respondent. The second ground was that at the material time the second appellant was an undischarged bankrupt and as such the second appellant had no legal capacity to sell the subject land by virtue of s 24(4) Bankruptcy

H Act 1967 ('the Act'). The third ground is the non payment of the purchase price as agreed in the 1989 agreement. The learned counsel for the appellants said during the trial the second respondent gave evidence that he had in his possession payment vouchers to prove that the purchase price had been paid. However these vouchers were never produced nor admitted in evidence.

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Held, dismissing the appeal:

- (1) On the authority of *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, even though on the date of execution of the 1989

agreement the second and third appellants did not have any registered right or interest in the subject land that does not render the agreement which is otherwise valid and enforceable to be void or invalid. The second and third appellants at the material time have sufficient interest in the subject land to enter into a binding agreement by which they agreed to transfer the subject land when the title or interest in the subject has been registered in their names. In other words the parties agreed that the agreement will only become enforceable the moment the second and third appellants' right or interest in the subject land is registered under the Ordinance (see para 6).

- (2) Section 24(4) has no application in the present case as the subject land at the material time could not qualify as property that is capable of being divisible among the creditors of the second appellant. For it had not been registered in the name of the second appellant. Furthermore no premium had been paid in respect of the subject land. It was for all intents and purposes still state land. Under s 88 of the Ordinance, no title to land shall be valid until it is registered in accordance with Part V of the Ordinance. Further s 24(4) of the Act has to be read subject to the Land Ordinance, the law governing the property in question. In this case, the official assignee had not taken steps to intervene or to register his interest in the subject land under the Ordinance. In the circumstances the second appellant's right or interest in the subject land is not in any manner affected by his bankruptcy (see paras 9–11).
- (3) Under the said agreement, it is incumbent on the purchaser to pay the balance of purchase price within 60 days from the date of signing the agreement. The proviso to the agreement sets out what needs to be done by the vendors should the purchaser fail to pay up within the stated time, that is, to give the purchaser two weeks written notice. In the event the purchaser fail to comply with the notice then the vendors are entitled to cancel the agreement. There is no evidence that such a notice had ever been issued by the appellants. In any case this is a finding of fact which the appellate court would normally be most reluctant to interfere unless the finding is perverse and not supported by the evidence before the court (see para 16).

[Bahasa Malaysia summary]

Perkara pokok pertelingkahan kes ini ialah berhubung sebidang tanah ('tanah tersebut'). Pada 1 Februari 1989, defendan kedua dan ketiga ('perayu kedua dan ketiga') memasuki satu perjanjian jual beli dengan plaintif kedua ('responden kedua') berhubung tanah tersebut. Teras utama rayuan tersebut ialah perjanjian jual beli bertarikh 1 Februari 1989 ('perjanjian 1989 tersebut') di antara perayu kedua dan ketiga di satu bahagian dan responden-responden di bahagian lain adalah tidak sah dan batal atas tiga alasan utama. Pertama, adalah pendapat perayu-perayu bahawa pada tarikh pelaksanaan perjanjian 1989 tersebut dan surat kuasa wakil yang dipersoalkan itu tanah tersebut masih belum lagi didaftarkan di atas nama perayu kedua dan ketiga. Berdasarkan s 88 Ordinan Tanah Sabah ('Ordinan tersebut'), perayu-perayu mendakwa bahawa pada masa material tersebut, perayu kedua dan ketiga tidak mempunyai sebarang hak atau kepentingan di atas tanah tersebut yang dapat diberikan kepada responden pertama. Alasan kedua ialah bahawa pada masa

- A yang material tersebut, perayu kedua adalah seorang bankrap yang belum dilepaskan dan dengan itu perayu kedua tidak mempunyai kapasiti yang sah untuk menjual tanah tersebut di bawah s 24(4) Akta Kebankrapan 1967 ('Akta tersebut'). Alasan ketiga ialah pembayaran yang tidak dibuat terhadap harga belian seperti yang dipersetujui di dalam perjanjian 1989 tersebut. Peguamcara perayu yang bijaksana menyatakan bahawa ketika perbicaraan responden kedua memberi keterangan
- B bahawa dia mempunyai dalam jagaannya baucar-baucar bayaran untuk membuktikan bahawa harga belian telah dibayar. Akan tetapi baucar-baucar ini tidak pernah dipamerkan ataupun dimasukkan sebagai bukti.
- C **Diputuskan**, menolak rayuan tersebut:
- (1) Atas autoriti *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, walaupun pada tarikh pelaksanaan perjanjian 1989 tersebut perayu kedua dan ketiga tidak mempunyai sebarang hak atau kepentingan yang berdaftar di atas tanah tersebut, ia tidak akan menjadikan suatu perjanjian yang sah dan boleh dikuatkuasakan sebagai tidak sah atau terbatal. Perayu kedua dan ketiga pada masa yang material mempunyai kepentingan yang mencukupi di dalam tanah tersebut untuk memasuki perjanjian yang mengikat di mana mereka bersetuju untuk pindah milik tanah tersebut apabila hak milik atau kepentingan di dalam tanah tersebut didaftarkan di atas nama-nama mereka. Dalam perkataan lain, pihak-pihak bersetuju bahawa perjanjian tersebut hanya berkuat kuasa sebaik sahaja hak dan kepentingan perayu kedua dan ketiga di atas tanah tersebut didaftarkan di bawah Ordinan tersebut (lihat perenggan 6).
- (2) Seksyen 24(4) tidak terpakai di kes ini oleh kerana tanah tersebut pada masa yang material tidak layak dijadikan hartanah yang dapat dibahagikan di antara pemiutang-pemiutang perayu kedua. Oleh kerana ia tidak didaftarkan atas nama perayu kedua. Selanjutnya tiada premium telah dibayar berhubungan dengan tanah tersebut. Oleh itu, untuk apa-apa niat dan tujuan ia masih tanah kerajaan. Di bawah s 88 Ordinan tersebut, hak milik tanah adalah tidak sah melainkan ia didaftar mengikut bahagian V Ordinan tersebut. Selanjutnya s 24(4) Akta tersebut mesti dibaca tertakluk kepada Ordinan Tanah, undang-undang yang mengawal hartanah tersebut. Dalam kes ini pegawai penerima harta tidak mengambil langkah untuk mencelah atau untuk mendaftarkan kepentingannya di dalam tanah tersebut di bawah Ordinan tersebut. Dalam keadaan ini, hak dan kepentingan perayu kedua dalam tanah tersebut tidak dalam apa juga keadaan dijejaskan oleh kebankrapannya (lihat perenggan 9–11).
- (3) Di bawah perjanjian tersebut, adalah kewajipan pembeli untuk membayar baki harga belian dalam masa 60 hari dari tarikh perjanjian tersebut ditandatangani. Proviso perjanjian tersebut membentangkan apa yang perlu dilakukan oleh penjual sekiranya pembeli gagal membayar dalam masa yang dinyatakan, iaitu, memberikan pembeli dua minggu notis secara bertulis. Sekiranya pembeli gagal untuk mematuhi notis tersebut maka penjual berhak membatalkan perjanjian tersebut. Tiada bukti bahawa terdapat notis sebegini pernah dikeluarkan oleh perayu. Dalam apa juga pun, ini merupakan carian fakta

di mana mahkamah rayuan enggan campur tangan kecuali sekiranya ia penemuan yang berlawanan dan tidak disokong dengan sebarang bukti di mahkamah (lihat perenggan 16).]

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Notes

For a case on Sabah Land Ordinance (Cap 68), see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2970.

B

For a case on sale of land by undischarged bankrupt, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2349.

Cases referred to

Borneo Housing Mortgage Finance Bhd. v Time Engineering Bhd. [1996] 2 MLJ 12 (folld)

C

Chua Tin Hong, In Re; ex parte Castrol (M) Sdn Bhd [1997] 3 CLJ 174 (refd)

Hussaina Rani il/k Naina Mohamed (suing as widow of Naina Mohamed, deceased v Ahmad Nadzri Kamaruddin & Anor [1997] 2 MLJ 534 (refd)

Leong Huat Sawmill (Pte) v Lee Man See [1985] 1 MLJ 47 (refd)

D

Legislation referred to

Bankruptcy Act 1967 s 24(4)

Sabah Land Ordinance s 88

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Appeal from: Originating Summons No S(24)39 of 1995 (High Court, Sandakan)

Hamid Ismail (Sugumar & Co) for the appellant.

Liew Ting Ting (Chin Lau Wong & Foo) for the respondent.

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Arifin Zakaria JCA (now FCJ, delivering judgment of the court)::

[1] The subject matter of the dispute in this case is a piece of land measuring 997 acres bearing title deed CL 085311075, situated at Sungai Ruku-Ruku, Labuk/Sugut, Sabah ('the subject land'). The learned judge had meticulously set out the relevant facts in his judgment which for convenience are reproduced below:

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One set of chronology of events which are not in dispute are as follows:

- (a) On 1 February 1989, the second and third defendants entered into a sale and purchase agreement with the second plaintiff in respect of the subject land with a consideration of RM100,000;
- (b) On 1 February 1989, the second and third defendants also executed a Power of Attorney thereby appointing the second plaintiff as their attorney;
- (c) A supplementary agreement was also entered into between the second and third defendants and the second plaintiff on 6 March 1989;
- (d) Pursuant to his appointment as the attorney for the second and third defendants, the second plaintiff signed the draft title of the subject land on 14 August 1989;
- (e) On 15 January 1993, the second plaintiff sold the subject land to the first plaintiffs vide a sale and purchase agreement on even date at the price of RM185,630;

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- A** (f) And on the same date, ie 15 January 1993 the second plaintiff executed a substitution under a Power of Attorney in favour of the first plaintiffs;
- (the foregoing transactions are hereinafter collectively referred to as 'the transactions');
- (g) Upon payment of the premium to the relevant authority, the title deed for the subject land was issued and registered on 16 September 1994;
- B** (h) Upon issuance of the issued document of title the first plaintiffs took possession of it; and
- (i) On 15 May 1997 the first plaintiffs finally managed to transfer the subject land to their name, having earlier on being impeded by the presence of caveat lodged by the first defendants against the title of the subject land. It is also pertinent to note that the first plaintiffs as the substitute attorney for the second and third defendants signed the Memorandum of Transfer for the transferors.
- C**

The other set of events are as follows in chronological order:

- (i) On 4 October 1978, a receiving order and an adjudication order were issued upon the second defendant;
- D** (ii) But on 21 July 1993, both the receiving adjudication orders were rescinded and annulled; and
- (iii) On 23 August 1995, the second and third defendants entered into a sale and purchase agreement with the first defendants for the sale of the subject land to the latter.
- E** It is also not in issue that on 28 January 1995 amendments were effected on the title deed of the subject land and thereby allowing the planting of oil palm on the subject land instead of rubber and also to bring it under 75% cultivation by January 1993.

- F** [2] Arising from the above facts, the respondents applied to the High Court by way of originating summons seeking among others a declaration that first respondent is by virtue of the sale and purchase agreement dated 15 January 1993 between first respondent and the second respondent, the second respondent is entitled to register their name on the title deed of the subject land. The originating summons was converted to a writ action and the parties then filed their respective pleadings. The appellants in their counter claim sought, inter alia, the declarations that:

- G** (i) the second respondent did not have the power under the Power of Attorney dated 1 February 1989 to enter into the sale and purchase agreement dated 15 January 1993 with the first respondent; and
- (ii) a declaration that the sale and purchase agreement between the second and third appellants on the one part and the first appellant on the other part is valid and subsisting and enforceable.
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- I** [3] The appellants also prayed for other consequential reliefs. The respondents' application was allowed and hence the reliefs sought for by the appellants naturally were dismissed by the learned judge. We had earlier dismissed this appeal and we now give our reasons for the same.

[4] The main thrust of the appeal is that the sale and purchase agreement dated 1 February 1989 ('the 1989 agreement') between the second and third appellants on the one part and the respondents on the other part was invalid and void on three

main grounds. Firstly, it is the contention of the appellants that on the date of execution of the 1989 agreement and the impugned Power of Attorney the subject land was yet to be registered in the name of second and third appellants. Based on s 88 of the Sabah Land Ordinance ('the Ordinance') the appellants claim that at the material time the second and third appellants did not have any right or interest over the subject land which is capable of being disposed by to first respondent. Section 88 of the Ordinance reads:

No new title and no dealing with, claim to or interest in any land except land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part.

[5] This section came for consideration of the Federal Court in *Borneo Housing Mortgage Finance Bhd. v Time Engineering Bhd.* [1996] 2 MLJ 12. Edgar Joseph Jr FCJ delivering the judgment of the court, after considering s 88 of the Ordinance stated at p 25:

Part V of the Land Ordinance provides for a modified Torrens system of land registration in Sabah and this section corresponds to the provision necessary in this system to ensure that no title to interests in land shall pass until the dealing has been registered. The language employed is somewhat different from that used in the majority of systems in use in the Commonwealth. The usual provision is to the effect that no instrument shall be effectual to pass any interest in land without registration and that, upon registration, the interest shall pass. See s 27 of the Land Titles Ordinance 1956 of Singapore for an illustration, and also the reference to the number of jurisdictions in which this provision exists set out in p 116 of *Hogg's Registration of Title to Land Throughout the Empire*. In nearly all jurisdictions, however, notwithstanding variations in the language used, it has been held that these provisions do not render unenforceable contracts or agreements which would lead up to the execution and registration of instruments. Even the unregistered instrument itself may give a title in equity and an equitable right to enforce the agreement which must have existed between the parties when the instrument was executed. See *Abigail v Lapin* [1934] AC 491. Section 4 of the Selangor Registration of Titles Regulation 1891 employed what is probably the most sweeping language used in these provisions. That section provided that land comprised in a grant shall not be capable of being dealt with except in accordance with the statutory provisions and that 'any attempt' to deal with land except in this manner 'shall be null and void and of none effect'. Nevertheless, in *Haji Abdul Rahman v Mohamed Hassan* [1971] AC 209; 1 FMSLR 290, the Judicial Committee of the Privy Council held that an agreement, not in registrable form, to transfer back certain land upon a certain contingency happening, while 'valueless as a transfer or burdening instrument' (at p 215) was good as a contract. It was said that it was not an 'attempt to transfer, but a conditional promise to transfer' (at p 214).

The language of s 88 is not nearly as sweeping as that of the Selangor provision. Moreover, its effect is confined to a new title or a dealing with, claim to, or interest in land. Following the foregoing authorities, and others too numerous to mention, in my judgment s 88 does not affect contracts or agreements otherwise valid and enforceable. As was pointed out in *Abigail's* case (at p 500), the provision for protection of unregistered interests by caveats shows that the legislation does not attempt to render all unregistered interests non-existent. What it does, is to prohibit the acquisition of a legal estate or interest in land except by registration of an instrument in the statutory form. Section 116 of the Land Ordinance of Sabah makes the usual provision for caveats which may be registered 'by any person claiming to be entitled to any interest' in any land. Obviously, such a provision is

A inconsistent with any interpretation of s 88 which involves holding that any agreements or other documents affecting land are of no effect and that only registration of the dealing in the land is to have legal validity at all.

For these reasons, I hold that s 88, notwithstanding the variation in language from that used in most jurisdictions, does not render this agreement for a lease invalid or unenforceable.

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[6] On the above authority, it is our view that even though on the date of execution of the 1989 agreement the second and third appellants did not have any registered right or interest in the subject land that does not render the agreement which is otherwise valid and enforceable to be void or invalid. We hold that second and third appellants at the material time have sufficient interest in the subject land to enter into a binding agreement by which they agreed to transfer the subject land when the title or interest in the subject has been registered in their names. In other words the parties agreed that the agreement will only become enforceable the moment the second and third appellants' right or interest in the subject land is registered under the Ordinance. We find no difficulty with such an arrangement. For the above reasons, we find no merit in the first ground canvassed before us by the appellants.

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[7] The second ground was that at the material time the second appellant was an undischarged bankrupt and as such the second appellant had no legal capacity to sell the subject land. This is so because under the Bankruptcy Act 1967 ('the Act') all his property, including the subject land, vests on the Official Assignee ('OA') upon him being adjudged a bankrupt on 14 October 1978. And as such, only the OA has the capacity to enter into the agreement for the benefit of the creditors.

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[8] In support of his argument, learned counsel for the appellants relied on s 24(4) of the Act which reads:

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24. Adjudication of Bankruptcy

(4) When a debtor is adjudged bankrupt his property shall become divisible among his creditors and shall vest in the Official Assignee.

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[9] Having considered the grounds relied upon by the learned judge, we agree with the reasons advanced therein. Like the learned judge, we are of the view that s 24(4) of the Act has no application in the present case as the subject land at the material time could not qualify as property that is capable of being divisible among the creditors of the second appellant. For it had not been registered in the name of the second appellant. Furthermore, no premium had been paid in respect of the subject land. In our view, it was for all intents and purposes still state land. Under s 88 of the Ordinance, cited earlier, no title to land shall be valid until it is registered in accordance with Part V of the Ordinance.

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[10] Further s 24(4) of the Act has to be read subject to the Land Ordinance, the law governing the property in question. *In re Chua Tin Hong; Ex parte Castrol (M) Sdn Bhd* [1997] 3 CLJ 174, Augustine Paul JC (as he then was) had correctly stated the position where he observed that:

... s 24(4) of the Bankruptcy Act 1967 must be interpreted as being qualified by s 349 of the Code (National Land Code) as far as land is concerned. As s 24(4) of the Act is subjected to the specific requirements of s 349 of the Code it follows that the title to or interest in property of the Official Assignee which consists of land will vest and divest only on registration and if the Bankrupt had transferred his interest in land to some person who had registered the transfer before any transmission was registered by the Official Assignee then the bankrupt's interest would, notwithstanding his bankrupt, have passed to such person (see *Messiter v Wollerman & Freeman* [1970] 27 NZLR 589).

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[11] In this case, the OA had not taken step to intervene or to register his interest in the subject land under the Ordinance. In the circumstances, we hold that the second appellant's right or interest in the subject land is not in any manner affected by his bankruptcy.

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[12] The other issue raised before us is the non payment of the purchase price as agreed in the 1989 agreement. In his submission, learned counsel for the appellants drew our attention to the evidence of second respondent with regard to the same. He said during the trial, the second respondent gave evidence that he had in his possession payment vouchers to prove that the purchase price had been paid. However, he said these vouchers were never produced or admitted in evidence. In the circumstances, the court ought to have drawn an adverse inference against the respondents for failure to produce the vouchers.

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[13] The learned judge in his judgment dealt with this point both on the evidence and on the pleading and came to his finding that there is no merit in the appellants' contention. In his judgment, he stated:

And in any event, the second plaintiff (PW1) on one hand gave evidence that he had paid the purchase price. He attempted to show the payment vouchers in court. On the other hand, the third defendant (DW4) denied receiving any payment. He also took the position that the sale was only the timber in the subject land.

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Having considered these two diametrically opposite testimonies, I am inclined to believe PW1. I find it difficult to accept the evidence of DW4 as he seemed to deny knowing even the contents of the sale and purchase agreement dated 1 February 1989. At the same time, he said that he could only read Jawi. However, it is pertinent to note that when DW4 came to sign the documents in the office of PW3 the second defendant was with him. And there was no allegation that the second defendant was equally illiterate. Incidentally, the averment as to what was the subject of the transaction as between the second plaintiff and the second and third defendants was not pursued. In fact, the allegation of fraudulent misrepresentation was abandoned.

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I am also inclined to agree with the learned counsel for the plaintiffs that the issue of non-payment of the purchase price was not pleaded by the defendants in their defence. And litigants are bound by their pleadings (see *State Government of Perak v Muniandy* [1986] 1 MLJ 490; *Grimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 (SC)). On this score as well that I am unable to accept the argument of the defendants on this issue.

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[14] And he went to hold that there was no merit in the contention of the appellants.

A [15] On this issue, it is necessary to go back to the terms of the 1989 agreement. Clause 1 thereof stipulates as follows:

In consideration of the terms and conditions hereinafter mentioned, the Vendors agree to sell and the purchaser agree to buy the said land at the purchase price of Malaysian Ringgit: One Hundred Thousand (M\$100,000) only.

B The said purchase price shall be paid as follows:

- (a) Malaysian Ringgit Two Thousand (M\$2,000) only on the signing of this agreement;
- (b) The final balance of Malaysian Ringgit Ninety Eight Thousand (M\$98,000) only within sixty (60) days from the date of signing this agreement.

C Provided that if the purchaser fail to pay the payment mentioned under clause 2(b) on the due date, the vendors shall give two (2) weeks' written notice to the purchaser to pay the same and should the purchaser fail to pay after the expiry of the said notice, the vendors shall be entitled to cancel this agreement and forfeit whatever payments made by the purchaser under this agreement.

D [16] Under the said clause, it is thus incumbent on the purchaser to pay the balance of purchase price within 60 days from the date of the signing of the agreement. The proviso to the agreement sets out what need to be done by the vendors should the purchaser fail to pay up within the stated time, that is, to give the purchaser two weeks written notice. In the event the purchaser fail to comply with the notice then the vendors are entitled to cancel the agreement. There is no evidence that such a notice had ever been issued by the appellants. PW3, the solicitor who attended to the agreement gave evidence that he never received any complaint from the appellants that the purchase price for the subject land had not been paid. In the circumstances, we find there is ample evidence to support the finding of the learned trial judge that, on the balance, the evidence of the second respondent is to be preferred to that of the appellants. In any case, this is a finding of fact which the appellate court would normally be most reluctant to interfere unless the finding is perverse and not supported by the evidence before the court (see *Leong Huat Sawmill (Pte) v Lee Man See* [1985] 1 MLJ 47; *Hussaina Rani i/k Naina Mohamed (suing as widow of Naina Mohamed, deceased v Ahmad Nadzri Kamaruddin & Anor* [1997] 2 MLJ 534.

[17] For the above reasons, we dismissed the appeal herein with costs and further ordered that the deposit be paid to the respondents to account of costs.

H *Appeal dismissed.*

Reported by Sally Kee

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